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Supreme Court of the United States.

October Term, 1930.

No. 490.

Frank L. Young Company,
Petitioner,

v.

McNeal-Edwards Company,
Respondent.

Respondent's Brief.

ASA P. FRENCH,
Counsel for the Respondent.

(35,412)

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No. 490.

FRANK L. YOUNG COMPANY,
PETITIONER,
v.
McNEAL-EDWARDS COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF.

The respondent's contentions, dealing with those advanced in the petitioner's brief, appear in the order set forth therein, and, with the addition of a further statement of facts in conclusion, comprise the whole of the respondent's brief.

OPINIONS BELOW.

The petitioner, in its brief (p. 2), refers to the original opinion of *Anderson,* J., upon the merits, as being "now withdrawn." This, it is submitted, is hardly an accurate statement of the situation. It would appear rather that, the Circuit Court of Appeals having now considered the jurisdictional question involved, and having decided that question in favor of the respondent, it was quite unnecessary to reconsider its former opinion, which dealt solely with the merits of the controversy.

Jurisdiction.

There is obviously no question of the right of the petitioner to present this question in the form adopted.

The Question Presented.

The respondent contends, and has contended again and again (see Defendant's Plea in Abatement as Amended, Rec. pp. 9, 10), that the statement of fact in the first paragraph under the above heading of the petitioner's brief (p. 3) is garbled and inaccurate, and that the particular phrases "the present cross-action" and "the respondent's original action" are inappropriate and misleading.

Statement of the Case.

The respondent's version of the material facts is as follows:

In January, 1922, the respondent, a Virginia corporation, sold, through a broker in Baltimore, and shipped to the petitioner, a Massachusetts corporation in Boston, a quantity of Crude Menhaden Oil contained in drums, 1107 in number, belonging to the respondent (Rec. p. 17). The contract of sale called for "Prime 'A' Crude Menhaden Oil," and provided that the drums should be returned to the seller (p. 19). They were never returned.

The petitioner received the order, paid for it, and subsequently, in or about October, 1922 (p. 17), brought suit against the respondent in the Superior Court of Massachusetts for alleged breach of warranty of quality, predicating jurisdiction upon an attachment made by it upon, and limited to the value of, the drums in which the oil was delivered to the petitioner, and which were then in the petitioner's possession.

This suit was forthwith removed by the respondent to the District Court of the United States,—counsel appearing

"specially" in its behalf both in the removal proceedings and in the District Court.

In March, 1923, the respondent brought a cross-action in the District Court against the petitioner to recover the value of the drums attached in the above-named suit, and for their conversion. While these suits were pending in the District Court, the petitioner, on January 4, 1927, brought the present action in the District Court, seeking thereby to obtain unrestricted jurisdiction not limited to the value of the containers, and made service upon the respondent's counsel in the cross-action.

Thereafter, to wit, on February 28, 1927, the petitioner discontinued the original action in the District Court (p. 73).

The respondent seasonably pleaded in abatement of the present action, alleging, in substance (pp. 9, 10), that service, under the circumstances heretofore alleged, did not give to the petitioner the right to satisfy a judgment, if any, against any property of the respondent except the containers, but for the presence of which in Massachusetts the petitioner would have been obliged to bring its original action in Virginia, and that therefore the service attempted to be made upon the respondent's attorney was void, and of no effect.

A motion to dismiss based upon this plea in abatement was overruled, and the respondent answered over, taking proper steps to protect its rights under its special appearance. Upon trial, in February of 1928, the petitioner had a verdict of $10,730.17. The respondent, in its cross-action recovered $100, and the jury found specially that the fair value of the drums on September 15, 1922, the date when they were attached by the respondent, was $1384 (p. 71).

After the verdicts, on February 14, 1928, the respondent filed a motion in arrest of judgment in the case at bar, which was overruled by *Morton*, J., and the respondent's exception was saved (pp. 15, 16).

The respondent's petition for appeal was allowed on January 31, 1929 (p. 82), and on the same date it filed its assignment of errors, nine in number (pp. 82, 84), all of which were relied upon except that numbered 6 (p. 83).

Upon its appeal the respondent prevailed on the merits (Opinion of *Anderson*, J. (pp. 87-91)), and thereafter, upon reargument, the Circuit Court of Appeals dismissed the case for want of jurisdiction (pp. 94-114).

The petitioner now asks this Court that a writ of certiorari issue to review the judgment of the Court of Appeals.

The respondent calls special attention to the fact that, at the time when the petitioner's present action was brought, the *petitioner's original action was pending, and had not been discontinued, as stated at the bottom of page 4 of the petitioner's brief* (see Rec. pp. 14 and 73). The property [drums] described by petitioner as of "nominal value," referred to in the same sentence of that brief, was found by the jury to be worth thirteen hundred and eighty-four (1384) dollars.

It should also be noted, in passing, that nowhere in the record, as stated by the petitioner, does it appear that "For forty years these statutes have been applied in the District Court" (Petitioner's Brief, p. 6, at the top). It does appear, however, that the respondent's counsel may have questioned their applicability to the facts in this case, in that the respondent both pleaded in abatement and moved to dismiss, and later moved in arrest of judgment.

Argument.

1. With respect to the petitioner's contention that the provisions of a Massachusetts statute have been nullified.

Apart from the fact that no "pursuing" in this case can be charged against the respondent, it would appear that the correctness of an opinion of a United States Circuit Court of Appeals cannot be tested by whether or not it interferes

with State legislation. The "salutary use" of the decision in the District Court case of *Arkwright Mills* v. *Aultman*, 128 Fed. 195, does not appear in this record, but the respondent calls attention to the fact that the issues in that case were not the peculiar ones presented in the record now before the court.

In the *Arkwright* case, the service was upon "the attorney of record for the plaintiff *in the original action*" (sec. 3 of the Massachusetts statute). In the case presented upon this petition, and at the time when service was made upon the respondent's attorney, he could not correctly be so described.

2. With respect to the contention that the decision of the Circuit Court of Appeals here under scrutiny nullifies statutes of six other states besides Massachusetts (Petitioner's Brief, p. 8), it is regrettable, if true, but beside the mark, and not unusual.

3. As to the petitioner's suggestion appearing on page 7 of its brief, that seven federal judges have passed directly upon this question—

It is true that Circuit Judge *Francis C. Lowell* decided, in *Arkwright Mills* v. *Aultman & Taylor Machinery Co.*, that the service made in that case was good upon the particular facts there presented.

The respondent, however, does not concede that the opinion of *Dodge*, J., in *Coleman* v. *American Warp Company*, 235 Fed. 531, 536, "upheld the applicability of the statute."

Lowell, D.J., ruling upon the particular facts in the present case, denied the respondent's motion to dismiss; but *Morton*, J., in overruling its motion in arrest of judgment, simply passed upon the same question in another form, and applied the law of the case as established by Judge Lowell's decision.

4. Dealing with the petitioner's contention with respect to previous interpretations of this statute (Petitioner's Brief, pp. 10, 11, and 12), an examination of the case of

Champlin Refining Co. v. Gasoline Products Co., 29 Fed. (2d) 331, 338, does not, it is argued, justify the contention that the same Circuit Court of Appeals has declared the identical Maine statute to be part of the law of set-off. It clearly appears in that case that the most that was done was to refer to the existence of the statute.

5. The petitioner's contention is that the Massachusetts statute is applicable in the District Court for the District of Massachusetts, and not in conflict with any Act of Congress (Petitioner's Brief, commencing on p. 12). The argument against this contention is contained in the opinion of a majority of the Circuit Court of Appeals (pp. 98-114).

This is the first time that a federal court has undertaken to make an exhaustive and analytical examination of the statute under scrutiny, or any similar statute, and that task has been ably and thoroughly performed by Judge *Bingham* in the case here presented. Other courts have dealt with it superficially and have adopted, without question, the views of their predecessors.

Irrespective of the statute's applicability, the respondent has contended from the beginning that the facts in this case do not sustain the proposition that good and sufficient service was made upon it under that statute in the suit at bar.

6. The question of the appearance of justice.

It is respectfully urged that the "appearance of justice" to the respondent, in whose favor two decisions of the Circuit Court of Appeals have already been made in this case, renders it inappropriate that a writ of certiorari should issue.

Conclusion.

An examination of the facts discloses that the various actions in this litigation were brought in the following order:

1. Petitioner's action against the respondent in the Superior Court of Massachusetts, in or about October, 1922; removed to the District Court on January 2, 1923 (p. 73); and discontinued *February 28, 1927* (p. 73).

2. Respondent's cross-action against the petitioner brought in the District Court and returnable to that Court on March 20, 1923.

3. Petitioner's action, brought on January 4, 1927 (p. 3, bottom), in the District Court for the same cause of action as that set forth in its action brought in the State court, and on that date *still pending in the Federal Court.*

In this latter suit—*which is the only one now under consideration*—service was made upon the attorney for the respondent, upon the theory that the *cross-action brought by the respondent* was an "original action" which the respondent contends it clearly was not.

Respectfully submitted,
ASA P. FRENCH,
Counsel for the Respondent.